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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 926.

PETER L. SALEMI,

Petitioner,

v.

DUFFY CONSTRUCTION CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF IN OPPOSITION.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

This is a tort case involving only local law. Petitioner, the earth moving sub-contractor for a construction project, sought compensation for injuries incurred when, while within such construction project, he walked into an open pit approximately 6 feet wide, 40 feet long, and varying from 3 to 7 feet in depth. He did this at approximately 6:00 P.M. on Sunday, October 7, 1956, when the project was closed down for the Sabbath. He was not required to be there, and no one expected him. No one else was there. Petitioner had walked alongside at least 30 feet of the 40 foot length of the gulf before he tumbled into it. The pit was 200 feet from any public way.

Petitioner's subcontract said not one word concerning his right to enter the premises, as he concedes (Petition, pp. 76, 77).

At no time in this litigation until after the Supreme Court of Ohio rendered its judgment did Petitioner rely upon (1) any constitutional provision or (2) any statute (point (2) being conceded. Petition, p. 102).

Petitioner sued for negligence. His contract was not germane. It gave him no authority to enter the premises at other than business hours. Petitioner points to no such language in it.

The Supreme Court of Ohio held that Petitioner had no claim because he was a licensee rather than a business visitor. Petitioner urged the court below that his contract gave him the right of entry at all times, thus seeking to imply into the contract a provision not there.

Although Petitioner urges that the court below overruled prior decisions, even the dissenting Opinion below could not point to one prior decision which had been overruled. None was, as Petitioner all but stipulates (Petition, pp. 20, 97).

From this false premise Petitioner argues that this Court should overrule a long line of decisions, and hold that an alleged departure by a State court from earlier decisions construing isolated contracts contravenes Article I, § 10.

There is no merit in the argument. It cannot even be presented on this record.

But assuming that the decision below did overrule prior law, Petitioner would have this Court disregard *stare decisis* and overrule its own intrenched precedents (Petition, p. 57) while holding it unconstitutional to afford a like privilege below.

Jurisdiction rests on 28 U. S. C. § 1257(3).

No treaty or statute of the United States is involved, nor is any State statute "drawn in question on the ground of it being repugnant to the Constitution * * *."

Nor was there any claim of "* * * title, right, privilege or immunity * * * specially set up or claimed under the Constitution * * *," until presented to the Supreme Court of Ohio on application for rehearing. Then Petitioner claimed *only* that a decision against him offended the contract clause. This comes too late. *Radio Station WOW v. Johnson* (1945), 326 U. S. 120, 128, 65 S. Ct. 1475.

If there be jurisdiction here, there will be jurisdiction every time a State court refuses to conform a contract to the wish of the litigant.

No federal question can be tortured from the record. None was hinted *in limine*. The Ohio court applied settled Ohio law. The conditions of 28 U. S. C. 1257(3) are absent.

Respectfully submitted,

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